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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1373

NATHAN WECHSLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully petitions the Court for rehearing of the denial of his Petition for a Writ of Certiorari entered June 23, 1969. As grounds for rehearing, not previously presented, the petitioner states that,

(1) the United States was collaterally estopped from proceeding to trial on the count on which petitioner was convicted; and

(2) it has recently come to petitioner's counsel's attention that the United States withheld during trial material Jencks statements to which petitioner was entitled.

I

Petitioner was acquitted by the Court on Count 2, the substantive count of a two-count indictment; at the end of the Government's case (Jt. App. 288). He was convicted by the jury on Count 1, the conspiracy count, at the end of the entire case (Jt. App. 390). Count 2 alleged an offense under the so-called Travel Act, 18 U.S.C. 1952, enacted September 13, 1961.[1] Count 1 alleged a conspiracy under 18 U.S.C. 371 to violate 18 U.S.C. 1952.[2]

The acquittal on one count and the conviction on the other are contradictories.[3] With the acquittal on Count 2 the United States is collaterally estopped from asserting any facts which support Count 1 after September 13, 1961, the effective date of § 1952. The facts necessarily found for petitioner in connection with Count 2 require a dismissal on Count 1 also since the Court's findings were res judicata as to such facts and the Government was estopped from relitigating them (*Sealfon v. United States*, 332 U.S. 575; see also concurring opinion of Mr. Justice Black in *Williams v. United States*, 341 U.S. 70, 85)[4] and since peti-

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[1] This date is important, since it marks not only the enactment of § 1952 but also the beginning of the offense alleged in Count 2 and of the overt acts alleged in Count 1.

[2] Petitioner had moved for a judgment of acquittal at the close of the Government's case (C.A. 287). This motion was granted as to Count 2 on January 11, 1967 (C.A. 288), but denied as to Count 1. Petitioner again moved for acquittal as to Count 1 at the close of the whole case (C.A. 348). After the verdict of January 14, 1967, petitioner moved for a new trial on the ground that following the judgment of acquittal as to Count 2 the Court erroneously refused to dismiss Count 1 (C.A. 396).

[3] Petitioner, however, does not take exception to the line of cases which hold that an acquittal on a substantive count is not, in and of itself, a bar to conviction on a count charging a conspiracy to commit the crime charged in the substantive count. The unique facts of this case distinguish it from that line of cases.

[4] See also the following Circuit Court opinions: *United States v. DeAngelo*, 138 Fed. 2d 466 (C.A. 3, 1943); *Cosgrove v. United States*, 224 Fed. 2d 146 (C.A. 9, 1955); *Yawn v. United States*, 244

tioner cannot be convicted of conspiring to commit an act which is not yet a crime, *Parr v. United States,* 363 U.S. 370, 393.

Inasmuch as a "fundamental principle of justice" is involved (*United States v. Oppenheimer,* 242 U.S. 85, 88, 37 S.Ct. 68) and since petitioner will be deprived of his liberty because of the Court's error with respect to Count 1, it is important that this Court consider this petition.

The facts relevant to this petition pertaining to the indictments are as follows:

Count 1 charges that from January 1, 1961 to July 30, 1962 petitioner and eight other defendants conspired to violate 18 U.S.C. 1952, in that they conspired to use or cause to be used interstate facilities and travel to establish and carry on and facilitate the establishment and carrying on of bribery in violation of §§ 18.1-278 and 279 of the Virginia Code; and that the conspiracy was to be accomplished through the bribery of three supervisors of Fairfax County, Virginia, by petitioner and his three partners (who were also defendants) in connection with the rezoning of 84 acres of land in Fairfax County. The nine defendants were petitioner and his three partners (Sigmund Goldblatt, George Faigen and Seymour Faigen), the three Fairfax County supervisors (A. Claiborne Leigh, Stuart T. DeBell and Robert Cotten, Jr.), Lytton Gibson, an attorney retained to prepare and present the rezoning application, and William C. Burrage, the Director of Planning for Fairfax County.

Count 1 charges the following overt acts, all dated after September 13, 1961: On September 15, 1961 one of the supervisor defendants deposited a check for $1,000; on July 25, 1962 Gibson appeared before the supervisors in support of the rezoning application; on the same day Burrage rec-

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Fed.2d 235 (C.A. 5, 1957); *United States v. Kramer,* 289 Fed.2d 909 (C.A. 2, 1961). All of these cases except *Cosgrove,* involved earlier acquittals on substantive charges and later indictments for conspiracies.

ommended in favor of the rezoning and the three supervisors voted favorably; on June 17, 1962 Goldblatt wrote a letter to Gibson about the rezoning.

Count 2 charges that from September 13, 1961 to July 26, 1962 the same nine defendants travelled in interstate commerce and caused others to do so, and used and caused others to use interstate facilities to promote, establish, manage and carry on and facilitate the promotion, establishment, managing and carrying on of bribery in violation of §§ 18.1-278 and 279 of the Virginia Code, and thereafter performed acts to facilitate the promotion, establishment, management and carrying on of said unlawful activity.

Although the terminal dates alleged in the two counts differ by four days they are really the same. There is no evidence of anything between July 26 and July 30, 1962. The rezoning was accomplished on July 25, 1962, and that is the real terminal date for both counts.

The initial dates, however, are of controlling importance. The initial date under Count 2 is September 13, 1961, the date that 18 U.S.C. 1952 was enacted. No earlier date could have been alleged for Count 2, because § 1952 would have been ex post facto to anything prior to that date. The initial date in Count 1 is January 1, 1961 when the conspiracy allegedly began.[5] Now, petitioner was acquitted by the Court on Count 2 at the close of the Government's case. This has to mean that the Court found that petitioner did nothing after September 13, 1961, either personally or through another (*Pinkerton v. United States*, 328 U.S. 640), in connection with the alleged offenses. Two of his partners were found by the jury to have carried on their activity after September 13, 1961, but petitioner's acquittal on Count 2 can only mean that his activity had to have stopped before September 13, 1961 and that any conspiratorial

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[5]Note that Count 1 alleges a conspiracy to violate a statute which was not enacted until nine months after the conspiracy was allegedly formed.

activity on his part had to have taken place prior to that date.[6]

Petitioner's acquittal conclusively determined that petitioner engaged in no criminal activity, conspiratorial or otherwise, after the enactment of § 1952. It constitutes a finding that if petitioner engaged in any concerted activity prior to September 13, 1961, he withdrew from any such activity before § 1952 was enacted. His activity, therefore, cannot possibly be criminal because a conspiracy to commit an act which is not a crime is itself not a crime (*Parr v. United States*, 363 U.S. 370, 393).

II

The conviction is invalid on due process grounds in that the United States withheld from the defense at the time of trial certain Jencks Act statements of a Key Government witness, Robert Paul Peachey.

In October 1968 Peachey sued petitioner and others civilly because of a motion for a new trial in this case which they had filed charging Peachey with perjury.[7] On January 2, 1969 Peachey, on deposition in the civil case, testified that he had been interviewed by Internal Revenue Service agents on at least two occasions. During the first interview, which took place in late 1964 or early 1965, the agents made notes and took away with them a tape recording of the entire interview. Peachey testified that a second interview was conducted in the Summer of 1966, at which time he related to the agents, all of whom were taking notes, his

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[6]Of petitioner's partners in Trailer Court Ventures, one was also acquitted by the Court on Count 2 (C.A. 288) and convicted by the jury on Count 1, and the other two were each convicted on both counts. Of the other defendants, two of the supervisors were convicted on both counts, one supervisor was acquitted by the Court on both counts (C.A. 335), and the other two defendants were also acquitted by the Court on both counts (C.A. 343).

[7]*Peachey v. Boothe, Wechsler, et al.*, Corporation Court, Alexandria, Va., at Law No. 8586.

knowledge of suspicious circumstances regarding the "zoning cases."

At the beginning of the trial of the present case the United States turned over to defense counsel a number of Jencks Act memoranda, but none relating to Peachey, and the United States represented that the memoranda which it turned over were all that it had. The material which Peachey described in his deposition, however, appears to lie clearly within the purview of 18 U.S.C. 3500. *Clancy v. United States*, 365 U.S. 312, 314, 81 S. Ct. 645, 647 (1961). The government's withholding of such material and admitting its existence only as late as January 1969 (App. A, *infra*, p. 9) in and of itself invalidates the conviction.[8] *Clancy v. United States, supra.*

This Court on Petition for Certiorari or Rehearing has previously taken notice of intervening circumstances, bringing to light hitherto unknown violations of a defendant's constitutional rights *dehors* the trial and appellate record, particularly in eavesdropping and wiretapping cases. (See: *Black v. United States*, 385 U.S. 26, 87 S. Ct. 190 (1966); *Alderman v. United States*, 393 U.S. ___, 89 S. Ct. 961 (1969)).

CONCLUSION

This petition should be granted and the conviction vacated on the grounds (1) that petitioner's conviction on Count 1 is invalid under the doctrines of res judicata and collateral estoppel, and (2) that the conviction is invalid under the Jencks Act. If the United States, in replying hereto, raises issues of fact or law regarding the Jencks Act material, then, as a minimum, the case should be remanded to the District Court for an evidentiary hearing. *Campbell v. United States*, 373 U.S. 487, 83 S. Ct. 1356 (1963); *Hillard v. United States*, 317 F.2d 150 (C.A.D.C., 1963).

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[8] A motion for a new trial based on the Jencks Act has been filed in the District Court. The District Court, however, has not heard this motion, because of the pendency of the Petition for Certiorari in this case.

Pending the disposition of the remand, Petitioner's commitment should be stayed.

Respectfully submitted,

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Washington, D. C. 20005
HANS A. NATHAN
NORMAN E. BAYLES
1730 K Street, N. W.
Washington, D. C.
Attorneys for Petitioner

CERTIFICATE

We certify that this petition is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58.2.

Philip F. Herrick

Hans A. Nathan

APPENDIX A

AFFIDAVIT IN SUPPORT OF PETITION FOR REHEARING

DISTRICT OF COLUMBIA, ss:

PHILIP F. HERRICK, being duly sworn, deposes and says:

1. I am attorney for Petitioner NATHAN WECHSLER and make this affidavit in support of Petitioner's Motion for Rehearing.

2. On January 10, 1967, following the Court's direction to the prosecution to turn over to defense counsel all Government memoranda of all witnesses that would be called, counsel for the defendants received from the prosecution a number of memoranda of witness interviews, but no memorandum of an interview with Robert Paul Peachey. The Government stated that the memoranda it turned over were all that it had.

3. Peachey testified at the trial herein as a key witness for the prosecution.

4. On January 2, 1969, Peachey was deposed in connection with a civil case brought by him a few weeks earlier (*Peachey v. Boothe, et al.*, Law No. 8586, Corporation Court of the City of Alexandria). During that deposition, Peachey testified, among other things, that agents of the Internal Revenue Service made notes of several interviews which had been conducted prior to the trial of this case and that a tape recording was made of one of his statements.

5. On January 7, 1969, I spoke with Mr. Spratley, the United States Attorney, and with Mr. McElroy of the Internal Revenue Service, at Richmond, Virginia, calling the Government's attention to Peachey's deposition testimony. Messrs. Spratley and McElroy agreed to search their files to ascertain whether copies of any interview notes or memoranda were still extant.

6. On January 13, 1969, Mr. Spratley informed me that the Government had two sets of notes, one relating to an

interview with Peachey on March 22, 1965 which was connected only with Peachey's own personal tax problems, and one relating to an interview with Peachey on July 28, 1966 which contained at least nine items.

7. Mr. Spratley further informed me that the July 28, 1966 memorandum contained an item pertaining to the rezoning matter but only in a way which Mr. Spratley stated was unrelated to this case; and an item concerning an allegation by Peachey that "X" approached him and said that he was the "bag man" for "Y" and "Z", members of the Board of Supervisors, and that for $40,000, "X" could insure that the property would be rezoned. Mr. Spratley declined to reveal the names of "X", "Y" or "Z".

8. Although defense counsel requested the Government to produce these memoranda, the Government declined to produce any statements or memoranda except the excerpted version of the July 28, 1966 interview notes annexed hereto as Exhibit A.

9. This document admittedly contains at least two other paragraphs relevant to the subject matter of this proceeding. No defense counsel has seen, because the Government will not voluntarily exhibit, the complete memorandum.

10. Neither defendants, nor their trial counsel, knew, or, in the exercise of reasonable diligence should have known, of the existence of these memoranda until on or about January 2, 1969. At trial, defense counsel relied upon the statement of Government counsel that the documents turned over were all that the Government had.

/s/ Philip F. Herrick

Subscribed and sworn to before me this 10th day of July, 1969.

/s/ Catherine L. Guyon
Notary Public, D.C.

(Notarial Seal) My Commission expires May 31, 1973

EXHIBIT "[redacted]"

UNITED STATES DEPARTMENT OF JUSTICE

United States Attorney
Eastern District of Virginia
Post Office Box 1257
Richmond, Virginia 23210

CVSJr:ewr

January 13, 1969

Philip F. Herrick, Esquire
Shoreham Building
Washington, D.C. 20005

Re: *U.S. v. Wechsler, et al.*

Dear Phil:

Although it is the Government's position that the attached statement is not Jencks material, I am nevertheless giving you the interview report. The remainder of the interview report does not pertain to the Wechsler case and if you have any questions concerning this aspect, please take them up with Ed Joyce.

Sincerely,

/s/ Vernon
C. V. Spratley, Jr.
United States Attorney

Encls.

cc: Edward T. Joyce, Esquire
Organized Crime & Racketeering Sec.
Crim. Div., Dept. of Justice
Washington, D.C. 20530

Memo Conversation with Paul Peachy:

July 28, 1966
Intelligence Division
Internal Revenue Service
Bailey's Cross Roads, Va.

Present: Special Agent Kenneth E. McElroy
Special Agent Max C. Johnson

I told Mr. Peachy I was investigating the income tax affairs of

8. That also prior to the board meeting for the zoning GEORGE FAIGEN (who was also having his property adjacent to his rezoned) called him and told him 1) "don't even appear", we don't have to be there because, 2) the rezoning is going to go through and 3) I had to pay through the nose for it.

/s/ Kenneth E. McElroy /s/ Max C. Johnson